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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. .....

C. P. A. COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The C. P. A. Company, a Michigan corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on February 17, 1943, affirming the decision of the United States Board of Tax Appeals (now The Tax Court of the United States).

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 76-85) is reported in 45 B.T.A. 365. The Circuit Court of Appeals affirmed the Board without opinion by order (R. 93) which is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1943 (R. 93). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Petitioner, operating under the insurance laws of the State of Michigan, is a "life insurance company" within the meaning of the Revenue Acts of 1934 and 1936, where more than 50% of its total reserve funds were held for the fulfillment of contracts insuring against the loss of life and against the loss of job on account of disability or old age.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the Revenue Act of 1936 and Treasury Regulations 94 issued thereunder are set forth in Appendix A hereto. The corresponding provisions of the Revenue Act of 1934 and the Treasury Regulations issued thereunder are the same.

The pertinent provisions of the Michigan statutes are set forth in Appendix B hereto.

STATEMENT

The Petitioner, a corporation organized under the insurance laws of the State of Michigan, is and has been operating specifically under Part III, c. I, Subdivision Four, Section 14 of the Insurance Code of Michigan (Compiled Laws of Michigan, 1929, Section 12,402) (R. 76).

The purposes of the corporation set forth in its Articles of Incorporation, as amended July 17, 1923, are: (1) To insure railway employees against loss of position resulting from discharge or retirement; (2) To insure any person against bodily injury or death by accident, or against disability on account of sickness, and (3) To insure the lives and health of persons and every insurance pertaining thereto, and to grant, purchase or dispose of annuities (R. 77). The business of the Petitioner at all times here material was confined exclusively to issuing policies of insurance to railway employees (R. 45 and 77).

During the taxable years 1935 and 1936, the Petitioner had outstanding and in force nine types of insurance policies, of which all but three insured the owner against the loss of life and, in the case of four of them, also against the loss of job on account of disability or old age (R. 69, 77-78). The three policies providing no insurance against loss of life (Old Regular, Old Special, and No Age Limit) may be disregarded for the purposes of this case as the reserves applicable thereto are approximately only 10% of the total reserves held for the fulfillment of all policies (Exh. I and J, R. 69). 90% of the policies issued and outstanding during the taxable years insured the owner against the loss of life (R. 79). Three of the policies—Preferred (Exh. B, R. 53), Guarantee (Exh. C, R. 57), and New Special (Exh. D, R. 59)—alone constituted more than 60% of the outstanding policies both in number and in reserves (R. 69).

All the policies are based upon a single annual premium with privilege of payment in monthly installments (R. 78-79). The Preferred policy provides, in the event of natural death, for the payment to the beneficiary of a funeral benefit of $500.00 or of all premiums, whichever is greater, and, in the event of accidental death, for payment to the bene-

ficiary of $1,000.00, or the return of premiums, whichever is greater. The Guarantee policy provides, in the event of natural death, for payment to the beneficiary of all premiums, and, in the event of accidental death, for the payment of $2,000.00 to the beneficiary. The New Special policy provides, in the event of natural death, for the payment to the beneficiary of all premiums. All three policies provide, in addition to the foregoing death benefits, for the payment to the insured of varying amounts, dependent upon the length of time the policy has been in force, in the event of his being retired from his job on account of physical disability, or, having attained the age of sixty-five years, on account of old age (Exh. B, C and D—R. 53-57 and 59). Railroad employees are retired generally at the age of sixty-five or seventy years, unless earlier retired by reason of disability (R. 79).

The total reserves set up and maintained by the Petitioner against all outstanding policies at the beginning and at the end of each of the taxable years, and the mean of the reserve funds for each year, are as follows (R. 81-82):

	1935	1936
Beginning of year	$1,975,882.00	$2,167,663.00
End of year	2,167,663.00	2,399,430.50
Total	$4,143,545.00	$4,567,093.50
Mean	$2,071,772.50	$2,283,546.75

Of the reserves at December 31, 1935 and December 31, 1936, only $298,230.00 and $289,516.00, respectively, were for the Old Regular and Old Special policies which provided no insurance against the loss of life. No part of the reserves was held for the No Age Limit policy (R. 80-81).

The Petitioner computed its reserves on the basis of the

American Experience Table of Mortality, with an assumed rate of interest of 4% as required by the Department of Insurance of the State of Michigan (R. 81). The reserves maintained during the taxable years were held exclusively against the unaccrued and contingent liability under the policies for the death and retirement benefits therein provided. No part of the reserves was maintained against liability for any discharge benefits provided in the policies (R. 80).

The Commissioner of Insurance for the State of Michigan, in accordance with his established practice as to all insurance companies, made periodical examinations of the Petitioner's business and independent valuations of its outstanding policies, and determined that the reserves were adequate (R. 46, 70-75). The Commissioner of Insurance required the Petitioner to carry the reserves for both retirement and death risks, and has continued to require such reserves (R. 24-25, 39). The Petitioner filed its annual statement with the Commissioner of Insurance for the State of Michigan, as required by the laws of Michigan, on miscellaneous form provided by the Commissioner, because there was no special form strictly applicable to the Petitioner's business (R. 30, 35-36, 39-40).

The Board of Tax Appeals found, inferentially, that the Petitioner's policies are life insurance contracts, but concluded that the reserve funds for the fulfillment thereof are less than 50% of the total reserve funds (R. 82). The Board, stating in its opinion that the Petitioner did not issue contracts of "combined life, health and accident insurance" (R. 83), held that the Petitioner is not a "life insurance company" within the statutory definition solely on the ground that of the total reserve funds held for the fulfillment of all contracts for combined death and retire-

ment benefits, more than 50% was held against the retirement risk thereof (R. 85).

The Circuit Court of Appeals for the Sixth Circuit, without opinion, affirmed the decision of the Board of Tax Appeals on the ground that the contracts issued by the Petitioner were not life insurance contracts, and were not contracts of combined life, health, and accident insurance (R. 93).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the contracts issued by the Petitioner were not life insurance contracts, and were not contracts of combined life, health, and accident insurance.

2. In failing to hold that the contracts issued by the Petitioner are life insurance contracts, and/or contracts of combined life, health, and accident insurance, and that the reserve funds held for the fulfillment thereof comprise more than 50% of the Petitioner's total reserve funds.

3. In failing to hold that the Petitioner is a life insurance company within the meaning of the Revenue Acts and taxable only as such.

4. In affirming the decision of the United States Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals holding that the contracts issued by the Petitioner are not life insurance contracts is in conflict with *Commissioner of Internal Revenue v. W. H. Luquire B. Assn. Co.*, 102 F.

(2d) 89, (C. C. A. 5th) and *Lamana-Panno-Fallo Ins. Co. v. Commissioner of Internal Revenue,* 127 F. (2d) 56 (C. C. A. 5th) and is erroneous. In the *W. H. Luquire B. Assn. Co.* case, the taxpayer, pursuant to the purposes set forth in its Articles of Incorporation, issued certificates or policies of burial insurance. Similarly, in the *Lamana-Panno-Fallo Ins. Co. case,* the taxpayer was engaged in the business of issuing contracts of burial or funeral insurance. In both cases the Circuit Court of Appeals for the Fifth Circuit held that such contracts are contracts of life insurance.

In the instant case, the record shows that all the policies or contracts issued by the Petitioner, with the three minor exceptions noted, insured the owner against the loss of life. In four of the contracts, the insurance is for a funeral benefit in a stated amount, with provision in three of them for double indemnity in the event of accidental death (Exh. B, E, F and G—R. 53, 61, 63 and 65). In a fifth contract, the insurance is for the payment of a stated amount in the event of accidental death, with provision for repayment of premiums in the event of natural death (Exh. C—R. 57).

Such contracts clearly are life insurance contracts by every recognized and accepted definition of life insurance (See *Couch Cyclopedia of Insurance Law,* Vol. 1, Section 34; *Cooley's Briefs on Insurance,* 2nd Edition, pp. 29, 32-33), and are expressly recognized as such in Michigan. Under the Michigan Insurance Code, (Compiled Laws of Michigan, 1929, Section 12,456) every corporation issuing contracts for the payment of money to families or representatives of certificate or policyholders is deemed to be a life insurance company.

2. The holding of the Circuit Court of Appeals is based upon a misconception of the stipulated facts, and is contrary to the conclusion of the Board of Tax Appeals which found, inferentially, that the contracts issued by the Petioner are life insurance contracts. The Board did not find, as a fact, that the Petitioner's contracts are not contracts of combined life, health, and accident insurance. The statement to that effect, in its opinion, is clearly contrary to the stipulated facts as is also the like conclusion of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals thus based upon findings or conclusions of ultimate facts contrary to the findings of the Board and to the stipulated facts, is inconsistent and probably in conflict with the decisions of this Court in *General Utilities & Operating Co. v. Helvering,* 296 U. S. 200, and *Helvering v. Rankin,* 295 U. S. 123. In the *General Utilities & Operating Co. case,* the Court, quoting from its opinion in the *Rankin* case, said: (p. 1128)

> " 'The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. * * * The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. * * * If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. * * * And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.' "

The Court then said: (p. 1128)

> "Here the court undertook to decide a question not properly raised. *Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever.* To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause." (Italics supplied).

In the instant case, all the facts pertaining to the nature of the Petitioner's policies or contracts were stipulated. It was not contended before the Board that the policies are not contracts of life insurance, and the Board found, inferentially, that they are contracts of life insurance, at least in part. The statement of the Board, in its opinion, that the Petitioner did not issue contracts of "combined life, health, and accident insurance" is not a finding of fact, but merely an argumentative observation which is contrary to the stipulated facts. The Board's decision is not based upon the character of the Petitioner's contracts, but solely upon the nature and adequacy of the reserves held for the fulfillment of such contracts. The Circuit Court of Appeals did not pass upon the question decided by the Board, and rested its decision solely upon a conclusion of fact at variance with the finding of the Board and with the stipulated facts.

3. The decision of the Circuit Court of Appeals, taken as an affirmance of the Board on the ground that the Petitioner's reserves are not of the character in sufficient amount to bring the Petitioner within the statutory definition of a life insurance company, is probably in conflict with the decision of this Court in *Helvering v. Oregon Mut. Life Ins. Co.*, 311 U. S. 267. In that case, the Commis-

sioner sought to disallow the deduction in respect of the reserves held against the disability features of combined life, health, and accident policies on the hypothesis that the statute allows the deduction only as to reserves for death losses. It appears that in the taxable years, the taxpayer's outstanding policies were about equally divided between disability contracts and those providing no disability benefits. (See opinion of the Circuit Court of Appeals in the same case, 112 F. (2d) 468-469). This Court, rejecting the contention of the Commissioner, said: (p. 1071)

> "It seems clear that Congress intended to permit the deduction of reserves based on those policies that make a company a 'life insurance company' under the Act, which, by definition, includes policies of 'combined life, health, and accident insurance.' The reserves here related to the disability provisions of such combined policies. The same underlying considerations that prompted the deduction for death reserves are applicable to the reserves for disability in these combined policies. And disability as well as death reserves fall literally within the language of the deduction provision."

This Court, in effect, held that for purposes of the statutory definition of a life insurance company, the disability reserves for combined life, health, and accident contracts must be included or grouped with the death or nondisability reserves. Indeed, the Circuit Court of Appeals in that case expressly so held. It said (112 F. (2d) 468, 470):

> "* * * For the purpose of classification, the disability reserves held against the combined policies are treated by the act as life insurance reserves * * *."

In the instant case, the stipulated facts show that approximately 90% of the Petitioner's policies insured against the loss of life and against the loss of job on account of disability or old age, and that both benefits are contained in one policy or contract. The insurance against the loss of job is, by the express terms of the policy, insurance against physical disability or advancing old age (over sixty-five years) resulting in the retirement of the insured by his employer. Such policies obviously are contracts of combined life, health, and accident insurance. The reserves held for the fulfillment of these combined contracts are nearly 90% of the total reserve funds of the Petitioner (R. 69).

4. The decision of the Circuit Court of Appeals results in a discriminatory application of the Revenue Laws to the great and serious, if not irreparable, damage of the Petitioner, and violates the clear intent of Congress. The Petitioner will be denied the classification for income tax purposes which is accorded other insurance companies engaged in the business principally of issuing like or analogous contracts. The Petitioner will be required to pay a tax on all premium receipts as income, notwithstanding it is required by State law to maintain a substantial, if not the major, part of such receipts as a reserve or trust fund for the benefit of policyholders, which is not available to the Petitioner for any other purpose.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

JOHN M. HUDSON,
Counsel for Petitioner.

Dated: May 7, 1943.

OF COUNSEL:

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APPENDIX A

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 201(a). DEFINITION.—When used in this title the term "life insurance company" means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.

SEC. 203(a). GENERAL RULE.—In the case of a life insurance company the term "net income" means the gross income less—

(2) RESERVE FUNDS.—An amount equal to 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, except that in the case of any such reserve fund which is computed at a lower interest assumption rate, the rate of 3¾ per centum shall be substituted for 4 per centum. Life insurance companies issuing policies covering life, health, and accident insurance combined in one policy issued on the weekly premium payment plan, continuing for life and not subject to cancellation, shall be allowed, in addition to the above, a deduction of 3¾ per centum of the mean of such reserve funds (not required by law) held at the beginning and end of the taxable year, as the Commissioner finds to be necessary for the protection of the holders of such policies only.

Treasury Regulations 94:

ART. 201(a)—1. *Life insurance companies: Definition.* The term "life insurance company" as used in Title I is defined in section 201(a). In determining whether an insurance company is a "life insurance company" as defined in section 201(a), no reserve shall be regarded as held for the fulfillment of an insurance contract unless it conforms to the definition of "reserve" contained in article 203(a)(2)—1.

ART. 203(a) (2)—1. *Reserve funds.*—In general, the reserve contemplated is a sum of money, variously computed or estimated, which, with accretions from interest, is set aside (reserved) as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims. It must be required either by express statutory provisions or by rules and regulations of the insurance department of a State, Territory, or the District of Columbia when promulgated in the exercise of a power conferred by statute, but such requirements, without more, is not conclusive; for example, it does not include reserves required to be maintained to provide for the ordinary running expenses of a business definite in amount, and which must be currently paid by every company from its income if its business is to continue, such as taxes, salaries, reinsurance and unpaid brokerage; the reserve or net value of risks reinsured in other solvent companies to the extent of the reinsurance; reserve for premiums paid in advance; annual and deferred dividends; accrued but unsettled policy claims; losses incurred but unreported; liability on supplementary contracts not involving life contingencies; estimated value of future premiums which have been waived on policies after proof of total and permanent disability.

In any case where reserves are claimed, sufficient information must be filed with the return to enable the Commissioner to determine the validity of the claim. Reference should be made to the item in which the reserve appears in the annual statement and to the statute or insurance department ruling requiring that such reserves be held. Only reserves which are so required, which are peculiar to insurance companies, and which are dependent upon interest earnings for their maintenance will be considered. A company is permitted to make use of the highest aggregate reserve called for by any State or Territory or the District of Columbia in which it transacts business, but the reserve must have been actually held.

APPENDIX B

Michigan Compiled Statutes 1939 c. 242— General Insurance Law

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Part One, C. II.

Annual statement by company; forms, preparation by commissioner, contents. SEC. 7. It shall be the duty of each and every insurance company, foreign or domestic, transacting business within this state, annually, on or before March first (1st), to prepare under oath, and deposit with the commissioner of insurance, a statement concerning its affairs upon such form and including such information as shall be prescribed by the commissioner of insurance. It shall be the duty of the commissioner to prepare such forms of statements, as shall be suitable and adaptable to each kind or class of insurance authorized by this act. The commissioner of insurance is hereby authorized and directed to include in such forms, requisitions for informaton upon any and all important elements of such business, including any matter, condition or requirement regulated by this act. (C.L. '29, S12255.)

Part Three, c. I, Subdivision One

Number of corporators; kinds of insurance; reinsurance; combination companies; application of act. SEC. 2. Thirteen (13) or more persons may become a corporation for the purpose of making any of the following kinds of insurance:

Life. First, Upon the lives and health of persons and every insurance pertaining thereto, and to grant, purchase or dispose of annuities;

Fidelity, surety. Second, To guarantee the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds and for the performance of other obligations, and to indemnify banks, bankers, brokers,

financial or moneyed associations, or financial or moneyed corporations, against the loss of any bills of exchange, notes, drafts, acceptances of drafts, bonds, securities, evidences of debt, deeds, mortgages, documents, currency and money, except that no such contract or indemnity indemnifying banks, bankers, brokers, financial or moneyed associations or financial or moneyed corporations shall indemnify against loss caused by marine risks, or risks of transportation or navigation.

Steam boiler and fly wheel. Third, To insure against loss or damage to property of the assured, and loss or damage to the life, person or property of another for which the assured is liable, caused by the explosion of steam boilers or their connections or by the breakage or rupture of machinery or fly wheels; and against loss of use and occupancy caused thereby;

Accident and health. Fourth, To insure any person against bodily injury or death by accident, or against disability on account of sickness;

Automobile and vehicle; public liability, etc. Fifth, To insure any person, firm or corporation against loss or damage on account of the bodily injury or death by accident to any person, or against damage caused by automobiles, vehicles or draft animals to property of another, for which loss or damage said person, firm or corporation is responsible, or against accidental damage sustained by automobiles or vehicles, or against all of the said contingencies, inclusive of workmen's compensation insurance;

Plate glass. Sixth, To insure against a breakage of plate glass, local or in transit;

Sprinkler and other water damage. Seventh, To insure any goods or premises against loss or damage by water caused by the breakage or leakage of sprinklers, pumps, water pipes or plumbing and its fixtures, and against accidental injury from other causes than fire or lightning to such sprinklers, pumps, water pipes, plumbing and fixtures;

Credit. Eighth, To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted to the assured to meet their liabilities;

Title. Ninth, To examine titles to real and personal property, furnish information relative thereto, and insure owners and others interested therein against loss by reason of encumbrances or defective title;

Burglary and theft. Tenth, To insure against loss or damage by burglary, theft or house breaking;

Livestock. Eleventh, Upon the lives of horses, cattle and other livestock or against loss by the theft of any of such property or both;

Burial. Twelfth, To insure any person a funeral benefit payable at death;

Malpractice. Thirteenth, To insure persons, firms or corporations lawfully engaged in the practice of medicine, surgery, dentistry, operation of hospitals, sanitariums or dispensing drugs or medicines against loss resulting from all claims and suits alleging malpractice, error or mistake and based upon professional services rendered or which should have been rendered by insured and/or his or her assistants or employees, and to defend and indemnify insured against any loss resulting from all other suits for civil damages arising out of the practice by insured of his profession; except that indemnity under such insurance shall not extend to claims or suits based on criminal acts or on services rendered while under the influence of liquor or drugs.

Special forms. Fourteenth, By and with the consent of the commissioner of insurance, to insure against any other hazards of a casualty nature not prohibited by the laws of this state nor exclusively delegated to any other class or kind of company.

Reinsurance privileges. Every company organized under this chapter shall have an authority to reinsure any risk authorized to be undertaken by them, and to grant reinsurance upon any similar risk undertaken by any other company, but shall not have power to undertake marine and fire risks or any other species of insurance whatever than that specified in some one (1) or more of the foregoing subsections; but a corporation may be formed for the combined purposes specified in the first (1st) and fourth (4th) subsections; or, upon compliance with the requirements of subdivision two (2) of this chapter, for all the purposes combined, or any two (2) of more of them specified in the third (3rd), Fourth (4th), fifth (5th), sixth (6th), seventh (7th), eighth (8th), ninth (9th), tenth (10th), eleventh (11th), thirteenth (13) and fourteenth 14th) sub-sections. A life insurance company may insure against the death of the insured by accident or against disability on account of accident or sickness, but against no other contingency specified in any sub-division of section two (2) of this chapter, unless engaged in insuring against such other contingency in this state prior to the first (1st) day of January in the year nineteen hundred nine (1909). The provisions of this chapter shall apply to any company heretofore organized, or that may hereafter be organized under this provision, for any and all of the purposes above specified. (C. L. '29, S12380.)

Part Three, c. I, Subdivision Three.

Annual valuation of life insurance companies; valuation by another state, acceptance; deficiency in assets, suspension of rights; change in standards; mortality table. SEC. 10. Every company doing a business of life insurance within this state shall annually prior to March first (1st), furnish the commissioner of insurance the data necessary for the valuation of all its outstanding policies to be made by the commissioner of insurance, or under his authority, and in making such valuation, the rate of interest to be assumed shall, after and including the year eighteen hun-

dred ninety-six (1896), be four (4) per centum per annum, and at the election of any such insurance company such rate of four (4) per centum shall be assumed any year prior to eighteen hundred ninety-six (1896), and the rate of mortality shall be that established by the "American experience life table," as shown in the schedule hereto annexed, and such company shall pay the commissioner of insurance, as a compensation for such estimate, one (1) cent for each thousand (1000) dollars insured: * * * The commissioner of insurance may, upon written application of the company, vary the standards of mortality and interest required by this section, value policies in groups, use approximations and accept the valuation of the department of insurance of any other state in place of the valuation required by this act; nothing in this paragraph shall be construed as permitting the use of standards of mortality and interest or methods of producing aggregate reserves lower than those based upon the standard prescribed by this section; said policies shall be valued in accordance with the terms of the policy contracts. In every case in which the actual premium charged for an insurance is less than the net premium for such insurance, based upon the American experience table of mortality with interest at the rate of four (4) per centum, then and not otherwise the company shall also be charged with the value of an annuity, the amount of which shall be equal to the difference between the premium charged and the net premium for such insurance based upon the American experience table with interest at the rate of four (4) per centum and the term of which in years shall equal the number of future annual payments due on the insurance at the date of valuation. (C.L. '29, S12397.)

Part Three, c. I, Subdivision Four

Corporation to insure against loss of position by railway employees, accidents, disability, life, health and to deal in annuities; incorporators. SEC. 14. Any number of persons, not less than thirteen (13), may associate together and

form an incorporated company for the following purposes, to-wit:

First, To insure railway employees against loss of position resulting from discharge or retirement;

Second, To insure any person against bodily injury or death by accident, or against disability on account of sickness;

Third, To insure the lives and health of persons and every insurance pertaining thereto, and to grant, purchase or dispose of annuities. (C.L. '29, S12402.)

Same; law applicable. SEC. 16. Such provisions of this part as are not inconsistent with, or in conflict with provisions of this subdivision are hereby made applicable to the operation of any company organized under the provisions of this sub-division. (C.L. '29, S12404.)

Part Three, c. II, Subdivision Two

Life insurance policy; mandatory provisions. SEC. 3. No policy of life insurance shall be issued in this state, unless the same shall contain the following provisions:

Premiums in advance. First, A provision that all premiums shall be payable in advance, either at the home office of the company or to an agent of the company, upon delivery of a receipt signed by one or more of the officers who shall be named in the policy;

Grace. Second, A provision for a grace of one (1) month for the payment of every premium after the first (1st) year, which may be subject to an interest charge, during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace the over due premium will be deducted in any settlement under the policy;

Entire contract; incontestability. Third, A provision that the policy, together with the application therefor, a copy of which application shall be endorsed upon or at-

tached to the policy and made a part thereof, shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two (2) years from its date, except for non-payment of premiums and except for violations of the policy relating to naval and military services in time of war, and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted;

Statements deemed representations. Fourth, A provision that all statements made by the insured, shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application and a copy of such application shall be endorsed upon or attached to the policy when issued;

Understatement of age. First, A provision that if the age of the insured has been understated, the amount payable under the policy shall be such as the premium would have purchased at the correct age;

Participation in surplus. Sixth, A provision that the policy shall participate in the surplus of the company, and that, beginning not later than the end of the fifth (5th) policy year, the company will determine and account for the portion of the divisible surplus accruing on the policy, and that the owner of the policy shall have the right to have the current dividend arising from such participation paid in cash, and that at periods of not more than five (5) years such accounting and payment at the option of the policy-holder shall be had. This provision shall not be required in non-participating policies;

Loans. Seventh, A provision that after three (3) full year premiums have been paid, the company at any time, while the policy is in force, will advance, on proper assignment of the policy and on the sole security thereof, at a specified rate of interest, a sum equal to, or at the option

of the owner of the policy, less than the reserve at the end of the current policy year on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserve, less a sum not more than two and one-half (2½) per centum of the amount insured by the policy and of any dividend additions thereto; and that the company will deduct from such loan value any existing indebtedness on the policy and any unpaid balance of the premium for the current policy year, and may collect interest in advance on the loan to the end of the current policy year; which provision may further provide that such loan may be deferred for not exceeding six (6) months after the application therefor is made. It shall be further stipulated in the policy that failure to pay any such advance or to pay interest shall not void the policy unless the total indebtedness thereon to the company shall equal or exceed such loan value at the time of such failure nor until one (1) month after notice shall have been mailed by the Company to the last known address of the insured and of the assignee, if any. No condition other than as herein provided shall be exacted as a prerequisite to any such advance. This provision shall not be required in term insurances:

Default in premium payments. Eighth, A provision which, in event of default in premium payments, after premiums shall have been paid for three (3) years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than two and one-half (2½) per centum of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office within one (1) month from date of default for a specified cash value at least equal to the sum

which would otherwise be available for the purchase of insurance as aforesaid and may stipulate that the company may defer payment for not more than six (6) months after the application therefor is made. This provision shall not be required in term insurances of twenty (20) years or less;

Table of loan values. Ninth, A table showing in figures the loan values, and the options available under the policies each year upon default in premium payments, during at least the first twenty (20) years of the policy, beginning with the year in which such value and options become available;

Default in premium; purchase of other insurance; reinstatement. Tenth, A provision that if, in event of default in premium payments, the value of the policy shall be applied to the purchase of other insurance and if such insurance shall be in force and the original policy shall not have been surrendered to the company and canceled, the policy may be reinstated within three (3) years from such default, upon evidence of insurability satisfactory to the company and payment of arrears of premiums with interest;

Settlement of claim. Eleventh, A provision that when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death, or not later than two (2) months after receipt of such proof;

Installments. Twelfth, A table showing the amounts of installments in which the policy may provide its proceeds may be payable;

Title. Thirteenth, A title on the face and on the back of the policies correctly describing the same.

Single premium policies. Any of the foregoing provisions or portion thereof relating to premiums not applicable to single premium policies, shall to that extent not be incorporated therein. (C.L. '29, S12427.)

Part Three, c. II, Subdivision Four

Policy violating chapter; effect. SEC. 20. A policy issued in violation of this chapter shall be held valid but shall be construed as provided in this chapter and when any provision in such policy is in conflict with any provision of this chapter the rights, duties and obligations of the insurer, the policy holder and the beneficiary shall be governed by the provisions of this chapter. (C.L. '29, S12447.)

Part Three, c. II, Subdivision Five

Business deemed life insurance companies; policy limitations; solicitations before deposit of securities, penalty, recovery of premium. SEC. 29. That all corporations, associations, partnerships, or individuals, doing business in this state under any charter, compact, agreement, or statute of this or any other state, involving an insurance, guaranty, contract, or pledge, for the payment of annuities or endowments, or for the payment of moneys to families, or representatives of policy or certificate holders or members, shall be considered and deemed to be life insurance companies within the meaning of the laws relating to life insurance within this State, * * * (C.L. '29, S12456.)

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531564—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1026

C. P. A. COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Circuit Court of Appeals did not file a written opinion. The opinion of the United States Board of Tax Appeals (R. 76–85) is reported at 45 B. T. A. 365.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 17, 1943 (R. 93). The petition for a writ of certiorari was filed on May 14, 1943. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer was engaged in writing job insurance contracts which, in most instances, also provided for certain payments if death occurred prior to the retirement or discharge of the insured. The reserves for death benefits, which were computed and maintained separately from the reserves for retirement benefits, constituted less than 50 percent of the total reserves. The question presented is whether the taxpayer is a "life insurance company" within the meaning of Section 201 (a) of the Revenue Acts of 1934 and 1936, so as to entitle it to the favored treatment that is accorded to life insurance companies under the revenue acts.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 201. TAX ON LIFE INSURANCE COMPANIES.
>
> (a) *Definition.*—When used in this title the term "life insurance company" means an insurance company engaged in the business of issuing life insurance and annuity contracts (including contracts of combined life, health, and accident insurance), the reserve funds of which held for the fulfillment of such contracts comprise more than 50 per centum of its total reserve funds.
>
> * * * * *

Section 201 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical with the above section of the Revenue Act of 1934.

STATEMENT

The taxpayer was incorporated on September 16, 1915, under the Insurance Code of the State of Michigan for the purpose of insuring railway conductors, engineers, and officials "against loss of position resulting from discharge or retirement," and of reinsuring other companies engaged in a similar business (R. 76). By an amendment to its articles in 1918, the nature of the business was restated to include the insurance of railway employees "against bodily injury or death by accident or against disability on account of sickness" (R. 77). A further amendment in 1923 stated the taxpayer's purposes to be (1) "To insure railway employees against loss of position resulting from discharge or retirement," (2) "To insure any person against bodily injury or death by accident or against disability on account of sickness," and (3) "To insure the lives and health of persons, and every insurance pertaining thereto and to grant, purchase or dispose of annuities" (R. 77).

The taxpayer's business at all times material here was confined exclusively to the issuing of policies of insurance to railway employees. The policies are entitled "Job Insurance For Railroad Men" (R. 77).

During the taxable years 1935 and 1936 the taxpayer had outstanding and in force nine different types of insurance policies[1] (R. 77). Four of the nine types provided for a discharge benefit and a retirement benefit due to disability or old age. The amount was dependent upon the length of time the policy had been in force. Upon death of the insured due to natural causes (and with one exception due to accident), all four provided for the payment of a stated amount (Ex. B and E) or the return of all premiums paid (Ex. C and D). The amount of the death or burial benefits had no connection with the discharge or retirement benefits. Upon the insured reaching the retirement age he received the amount definitely set forth in the policy. But if the insured died prior to the date of retirement, the beneficiary would not receive the amount indicated on the face of the policy as discharge or retirement benefits. (R. 77–78.)

Three other types of policies issued by the taxpayer (Ex. F, G, H; R. 63–67) provided for the payment of $5 a day for a stipulated number of days in the event of discharge of the insured. Two of these provided for a funeral benefit of $250, and one for double indemnity in case of death by accident (R. 63, 65). The third, together with the two remaining of the nine types,

[1] Copies of seven of the nine types of policies issued by the taxpayer during the taxable years involved were introduced in evidence as exhibits (R. 53–67).

contained no provision for death or funeral benefits (R. 78).

Ninety per cent of the policies issued and outstanding during the taxable years provided for the payment of a specified sum of money upon the death of the insured prior to discharge or retirement, as well as for the payment of a specified amount in the case of discharge or retirement. All of the policies provided for a single annual premium without any separate charge for the death or other benefit apart from the retirement benefit. (R. 78–79.)

The reserves set aside from premiums and maintained by the taxpayer during the taxable years were held exclusively against its unaccrued and contingent liability for either the death benefit or the retirement benefit payable under the policies in force during those years. No reserve was maintained for the discharge benefits. The retirement reserve and death-benefit reserve were separately computed and maintained, contrary to the practice of life-insurance companies generally. None of the policies of insurance provided for a cash surrender value. (R. 80, 82.)

Prior to 1937 the taxpayer computed the reserves set up and maintained by it against the liability for retirement and death benefits under issued and outstanding policies on the basis of the American Experience Table of Mortality, with an assumed rate of interest at 4 per cent, as required by the Department of Insurance of the

State of Michigan. The retirement reserve was computed in the same manner as a pure endowment reserve maturing at the age of 70 for the amount of the retirement payment benefit payable under each individual contract at that age. The death benefit (life) reserve was considered a yearly renewable term insurance and was computed and set up on that basis. (R. 81.)

The taxpayer's total retirement reserves as of December 31, 1935, and December 31, 1936, were $2,130,914 and $2,344,581. Its total death reserves, as of the same dates, were $34,127 and $41,748.80. (R. 80–81.)

The court below sustained the Board in rejecting the taxpayer's contention that it was a "life insurance company" under the definition contained in Section 201 (a) of the 1934 and 1936 Acts.

ARGUMENT

The basic issue in this case is whether the taxpayer is entitled to special classification as a life insurance company for income tax purposes, merely because most of its job insurance policies also provide for incidental death benefits if the insured should die before retirement or discharge. It is evident that the principal features of the policies are the retirement and discharge provisions. This is shown both by a comparison of the monetary payments provided by the policies (R. 84) and by a comparison of the reserves covering the death and retirement features (R. 80–81).

The taxpayer's position entails the two propositions that (1) any insurance contract which includes a death feature is a life insurance contract within the meaning of Section 201 (a) of the Act, and (2) that the reserves covering not only the death provisions but also all other provisions of such contracts must be counted in determining whether the 50-percent requirement of the statutory definition has been satisfied. The contentions are patently inconsistent with the manifest purpose of Section 201 (a) to include within the classification of life insurance companies only those companies engaged principally in writing life contracts. And the statute by expressly referring to "contracts of combined life, health, and accident insurance," clearly excludes by inference combined policies containing other nonlife features.

The court below, in its judgment, concluded that the contracts "were not life insurance and annuity contracts, nor were they contracts of combined life, health, and accident insurance" (R. 93). The Board of Tax Appeals had also stated that the contracts were neither annuity contracts nor "combined life, health, and accident insurance" (R. 83), but did not express an opinion as to whether they could nevertheless be considered as life insurance contracts; the Board placed its decision principally on the ground that the taxpayer's death reserves, as distinguished from its retirement reserves, did not constitute 50

percent of all its reserves as the statute requires (R. 85).

The decision, we think, is correct on whichever point emphasis is placed, and there is no conflict. There is no inconsistency, as the taxpayer asserts (Pet. 6–7), with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *W. H. Luquire B. Ass'n,* 102 F. 2d 89, and *Lamana-Panno-Fallo I. Ins. Co.* v. *Commissioner,* 127 F. 2d 56. Those cases hold that burial policies are life insurance contracts; the problem here arises from the combined characteristics of the policies. There is likewise no inconsistency (Pet. 8–9) with *General Utilities Co.* v. *Helvering,* 296 U. S. 200, and *Helvering* v. *Rankin,* 295 U. S. 123. The court below neither found facts which had not been found by the Board of Tax Appeals, nor based its decision on facts which were contrary to the Board's findings. At most it can be said that the appellate court sustained the Board's decision on a different theory, which, of course, it properly could do. *LeTulle* v. *Scofield,* 308 U. S. 415; *Helvering* v. *Gowran,* 302 U. S. 238.

Helvering v. *Oregon Ins. Co.,* 311 U. S. 267, held that a company, admittedly a life insurance company, was entitled, in determining the deduction measured by its "reserve funds required by law" under Section 203 (a) (2) of the 1932 Act, to include all the reserves attributable to its com-

bined life, health, and accident insurance. The probable conflict asserted with that decision, however, simply assumes one of the points in issue, for it rests on the premise that the taxpayer's policies were contracts of combined life, health, and accident insurance (Pet. 9–11). Both the Board of Tax Appeals (R. 82–85) and the court below held otherwise (R. 93).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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